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No. 07-1165

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARK E. OVERLAND, PAMELA POLOSKI,
OVERLAND & BORENSTEIN LLP,

Petitioners,

v.

COUNTY OF LOS ANGELES AND
SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

**On Petition For A Writ Of Certiorari
To The Court Of Appeal
Of The State Of California**

BRIEF IN OPPOSITION FOR RESPONDENTS COUNTY OF LOS ANGELES AND SUPERIOR COURT OF LOS ANGELES COUNTY

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QUESTIONS PRESENTED

1. Whether petitioners' lawsuit alleging a violation of the federal Takings Clause involves a justiciable case or controversy under Article III and its related prudential doctrines.

2. Whether petitioners raise a substantial federal question sufficient to support this Court's jurisdiction when their takings claim is brought against an arm of the State and its agent, neither of which is an appropriate defendant in a federal cause of action for an alleged constitutional violation and both of which are shielded by Eleventh Amendment immunity.

3. Whether the failure to remit to petitioners interest earned on money that was deposited pursuant to a contract with the State to secure the appearance of a criminal defendant, in lieu of other bail options, during the period after bail is exonerated, constitutes an unconstitutional taking, even though the terms of the parties' contract do not require payment of such interest.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the petition for a writ of *certiorari* and on the caption of this brief in opposition, two other parties were sued by petitioners in the state court: John A. Clarke, Executive Officer and Clerk of the Superior Court of California, County of Los Angeles, and J. Tyler McCauley, Auditor-Controller for the County of Los Angeles, in both their individual and official capacities.

Petitioners' failure to mention these additional parties in their *certiorari* petition constitutes a waiver of any claim for relief against them. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 89 (1946).

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BRIEF IN OPPOSITION

This Court's review is not warranted of the unpublished decision of the California Court of Appeal in this case. Petitioners claim that the failure by respondent Superior Court and respondent County to remit to them post-exoneration interest on bail money that they voluntarily deposited to obtain the release of a criminal defendant, violates the federal constitutional Takings Clause. But petitioners do not have standing to pursue their claim in this Court and respondents have governmental immunities against such a suit. Even if this were an appropriate vehicle for resolution of the legal issues raised by petitioners, review is no more warranted here where petitioners' claim involves a post-exoneration interest claim than it was when this Court denied review of petitioners' petition involving a pre-exoneration interest claim. *See Overland v. Superior Court,* 126 Cal. App. 4th 131 (2005), *rev. denied*, 2005 Cal. LEXIS 5065 (Cal. May 11, 2005), *cert. denied*, 546 U.S. 937 (2005).

STATEMENT

1. Statutory Framework

California has a comprehensive statutory scheme governing bail for criminal defendants arrested for violating state law. If a criminal defendant is eligible for bail, and he seeks release from custody pending disposition of his criminal charges, California provides four alternatives for posting bail.

First, a defendant may be released from custody upon the execution of a bail bond or the undertaking of bail by an admitted surety insurer. Cal. Penal Code §§ 1269, 1276(a). The surety guarantees to pay a fixed sum if the defendant fails to appear as required. *See People v. Amwest Sur. Ins. Co.*, 105 Cal. App. 3d 51, 54 (1980). Posting bail in this manner often involves a bail bondsman who acts as the surety's agent in negotiating with the defendant (or a person acting on defendant's behalf) and subsequently issues the bond. A professional surety typically charges a nonrefundable fee of 10 percent of the amount of the bail bond and, in addition to the fee, will usually require the posting of collateral (cash, a deed, or other property) to protect the surety. 1 *California Criminal Defense Practice* § 12.06[2] (Matthew Bender & Co. 2008). A bail bond may be posted with the clerk of the court or with the county sheriff at the jail where the defendant is being held in exchange for the defendant's release from custody. Cal. Penal Code § 1269b(a) & (g).

Second, in lieu of a bail bond, a defendant or other person may do as petitioners did in this case and deposit, in cash, the sum of money indicated in the order admitting defendant to bail or set forth in the court's fixed bail schedule. Cal. Penal Code §§ 1295(a), 1296. Cash for bail may be posted with the clerk of the court or with the county sheriff at the jail in exchange for the criminal defendant's discharge from custody. Cal. Penal Code § 1269b(a) & (g). The cash deposit scheme further provides that, "[w]hen money has been deposited, a receipt shall be

issued in the name of the depositor." Cal. Penal Code § 1297. If the depositor is the defendant, the government may, at the time of a judgment, apply the cash deposit to satisfy any fines, victim restitution, or costs owed by the defendant. *Ibid.* If, however, the person to whom the depositor receipt was issued was someone other than the defendant, the government cannot use the cash deposit to satisfy such obligations of the defendant. Rather, in that case:

> the deposit after judgment shall be returned to [the depositor] within 10 days after the person claims it by submitting the receipt, and, if a claim is not made within 10 days of the exoneration of bail, the clerk shall immediately notify the depositor of the exoneration of bail.

Ibid.

A cash deposit posted for bail with a county sheriff is transmitted to the judge or the clerk of the court. Cal. Penal Code § 1269b(g). The court must then transfer deposits to the county treasurer, where they are held pending an order from the court directing withdrawal or payment. Cal. Gov't Code § 68084(a)-(b). If the defendant fails to appear as required at court proceedings, the "money deposited instead of bail is forfeited." Cal. Penal Code § 1307. The statutory scheme does not expressly provide for payment of interest.

Third, again in lieu of a bail bond, a defendant or other person may deposit bonds of the United States or the State of California with a face value of

the cash deposit required and those bonds "shall be treated in the same manner as a deposit of money." Cal. Penal Code § 1298. If it becomes necessary, the clerk of the court upon order of the court may sell the bonds and "apply the proceeds of the sale in the manner that a deposit of cash may be required to be applied." *Ibid.*

Fourth, again in lieu of a bail bond, a defendant or other person may give to the court as security "any equity in real property which he or she owns," if a magistrate determines the value "is equal to twice the value of the cash deposit required." *Ibid.* When bail is posted in this manner, the property owner must execute a deed of trust in favor of the county, subjecting the property to a lien, but the owner continues to possess the property during the period of encumbrance. *See* Education Div. of the Administrative Office of the Courts, *California Judges Benchguides: Bail and Own-Recognizance Release* § 55.27, at p. 55-21 (2007); *Zolezzi v. Michelis*, 195 P.2d 835, 837 (Cal. Ct. App. 1948). If it becomes necessary, the clerk of the court upon order of the court may sell the equity and "apply the proceeds of the sale in the manner that a deposit of cash may be required to be applied." Cal. Penal Code § 1298.

2. Factual And Procedural Background

a. Petitioners, a law firm, one of its partners, and one of its employees, used the cash deposit for bail procedure discussed above and, on three separate

occasions, deposited cash with the Los Angeles County Sheriff's Department to secure the appearance of a criminal defendant (a different defendant on each occasion).

On September 1, 2000, petitioner Mark Overland deposited $500,000 with the Los Angeles County Sheriff's Department by way of a cashier's check to secure the release of a legal client in connection with a criminal action pending in the Superior Court of California, County of Los Angeles. Pet. App. 3. The county sheriff transferred the deposit to the court clerk, who deposited it with the county treasurer. Pet. App. 4. Petitioner Overland "did not use his own money for the cash bail deposit but he was the depositor." *Ibid.* The court exonerated the bail on June 19, 2001, and a check dated July 26, 2001 was issued to Overland in the amount of $500,000. *Ibid.* Overland requested interest on the deposit from the court's accounting division. No interest was paid to the depositor. *Ibid.*

On December 20, 2002, petitioner Pamela Poloski deposited $35,000 with the Los Angeles County Sheriff's Department by way of a cashier's check to secure the release of a criminal defendant in connection with a criminal action pending in the Superior Court of California, County of Los Angeles. *Ibid.*; C.A.E.R. 169. Petitioners do not allege in the complaint that petitioner Poloski owned the cash that she deposited and there is no evidence in the record to that effect. The court exonerated the bail on February 10, 2003, and a check was issued to

petitioner Poloski in the amount of $35,000 and received on March 13, 2003. No interest was paid to the depositor. Pet. App. 4.

On July 12, 2003, petitioner Overland & Borenstein LLP deposited $250,000 with the Los Angeles County Sheriff's Department by way of a cashier's check to secure the release of a criminal defendant in connection with a criminal action pending in the Superior Court of California, County of Los Angeles. Pet. App. 4-5; C.A.E.R. 169. Overland & Borenstein LLP did not own the money that it deposited; the money belonged to the criminal defendant. Pet. App. 5. The court exonerated the bail on July 25, 2003, and the cash bail was returned to Overland & Borenstein LLP in the amount of $250,000 on September 5, 2003. No interest was paid to the depositor. *Ibid.*

Although the statute provides that the deposit shall be returned to the depositor "within 10 days after the person claims it by submitting the receipt," Cal. Penal Code § 1297, petitioners did not submit any receipts, C.A.E.R. 168-169; Pet. C.A. Reply Br. 18-19, and thus did not trigger the 10-day return requirement.

b. Petitioners brought suit against, *inter alia*, respondents Superior Court of California, County of Los Angeles and the County of Los Angeles in California state court on September 26, 2003. Petitioners identified their claims as (1) a taking

without just compensation of the interest earned on the cash bail deposits pre-exoneration (*i.e.*, between the date of deposit and the date bail was exonerated), in violation of the federal and state constitutional takings clauses, citing the Fifth and Fourteenth Amendments of the federal Constitution and Sections 7 and 19 of Article I of the California Constitution; (2) a taking without just compensation of the interest earned on the cash bail deposits post-exoneration (*i.e.*, between the date bail was exonerated and the date the deposit was returned to petitioners), also in violation of the federal and state takings clauses; and (3) an unjust enrichment claim, against only the respondent County. C.A.E.R. 7-10. Petitioners sought money damages and declaratory and injunctive relief. C.A.E.R. 14-15.

On a demurrer by the respondent Superior Court, the trial court dismissed petitioners' pre-exoneration takings claim against all defendants, Pet. App. 6 & n.4, but did not dismiss petitioners' post-exoneration takings claim. *Ibid.* The claim of unjust enrichment was not challenged by the demurrer.

c. Petitioners sought interlocutory review of the dismissal of their pre-exoneration claims, and the California Court of Appeal ruled against petitioners on the merits. Pet. App. 6-8. The court held that petitioners' reliance on *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) was "misplaced" because "[t]hose cases involved the involuntary taking by the government of private

property, i.e., interest earned on client funds deposited in IOLTA accounts, for public use" which implicated the Fifth Amendment requirement to pay just compensation "when private property is taken for public use." Pet. App. 7 (quoting *Overland v. Superior Court*, 126 Cal. App. 4th 131, 140 (2005), *rev. denied*, 2005 Cal. LEXIS 5065 (Cal. May 11, 2005), *cert. denied*, 546 U.S. 937 (2005)). The court of appeal explained that "those constitutional concerns are absent" in the instant case because "there was no confiscation of private property by the court defendants for a public purpose, or at all." *Ibid.* The court emphasized that here petitioners "voluntarily deposited cash bail to free the criminal defendants from custody" and by doing so "entered into contracts with the government by which [they] guaranteed the appearance of the criminal defendants released on bail at all required court proceedings." *Ibid.* The court looked to the terms of the contract and the governing statute which defined the contractual obligations and concluded that the contract did not require payment of interest on cash bail deposits. Pet. App. 8 (citing *Overland*, 126 Cal. App. 4th at 140-141). "[T]he quid pro quo for the cash bail deposits which were posted herein was the release of the criminal defendants from custody." Pet. App. 8 (quoting *Overland*, 126 Cal. App. 4th at 142).

The California Supreme Court denied petitioners' petition for review of this denial of their pre-exoneration claims, Pet. App. 22, and this Court denied

petitioners' petition for writ of *certiorari* on that ruling as well. Pet. App. 23.

d. Back in the trial court, the parties filed cross-motions for summary judgment on petitioners' remaining post-exoneration takings claims, Pet. App. 9-10, and unjust enrichment claim, C.A.E.R. 149. The trial court denied petitioners' motion, granted respondents' motions, and entered judgment in respondents' favor. Pet. App. 10.

e. The California Court of Appeal affirmed. Pet. App. 1-18. The court of appeal concluded, as an initial matter, that petitioners' failure to show that they owned the money that they deposited with respondents did not deny them standing. The court summarily concluded that the state law requiring that the deposit be returned to the depositor was sufficient to confer standing. Pet. App. 12.

On the merits, the court of appeal rejected petitioners' post-exoneration takings claims for the same reason the court had rejected their pre-exoneration takings claims on the earlier appeal from the demurrer. The court reaffirmed that "the cash bail deposit is in the nature of a contract between the depositor and the government," and it concluded that the contract did not terminate at exoneration because respondents were "contractually obligated to return the cash bail deposit only *after* exoneration." Pet. App. 13-14. The court noted that although "unreasonable delay" in return of the bail deposit

"conceivably could give rise to a contract claim," it "does not constitute a taking." Pet. App. 14.

The court of appeal raised the issue of contract damages on its own at the time of oral argument and requested supplemental briefing. Pet. App. 16. The court ultimately ruled that petitioners waived any contract claims. Pet. App. 15-18. Petitioners "did not plead or argue" in the trial court "that delay in refunding the bail money constituted a breach of contract for which they were entitled to damages," and on appeal they "continued to adhere exclusively to their taking theory." Pet. App. 15-16. The court concluded that it was "inappropriate at this juncture to inject the contract theory into this case," Pet. App. 16, because "until the filing of their supplemental brief on appeal, plaintiffs have expressly eschewed a contract theory," Pet. App. 17, and "it would be unfair to [respondents] to reverse the grant of summary judgment in order to afford [petitioners the opportunity] to relitigate this matter as a contract action." *Ibid.*

The court of appeal denied rehearing, and in that order the court reaffirmed its ruling that petitioners waived any contract claims and noted that petitioners had belatedly attempted to revive their unjust enrichment claim only in their reply brief on appeal. Pet. App. 24-25.

The Supreme Court of California denied review. Pet. App. 26.

REASONS THE PETITION SHOULD BE DENIED

I. This is not an appropriate vehicle to address petitioners' claim because there are threshold jurisdictional obstacles that would prevent the Court from reaching the merits.

A. Petitioners lack standing to pursue their claim in federal court because they have not established that they have a personal stake in the interest they claim was unconstitutionally taken. They did not own the money that they deposited and, therefore, even if the owner of the money had a federal right to interest that was earned after the money was deposited to obtain release of a criminal defendant (which we maintain an owner does not), petitioners do not have any such right. Therefore, petitioners do not meet the requirements of Article III and its related prudential doctrines.

B. Also, petitioners have not raised a substantial federal question because they cannot obtain a remedy from respondent Superior Court who is an arm of the State and respondent County who served as its agent. Respondents fall outside the scope of permissible defendants under 42 U.S.C. § 1983, and are constitutionally immune from suit under the Eleventh Amendment.

II. Even if this case were free of jurisdictional obstacles, review would not be merited because the ruling below is correct and there is no disagreement in the lower courts on the issue.

A. The California Court of Appeal correctly ruled that no unconstitutional taking occurred. It held that when a criminal defendant in California chooses as an option to have cash deposited to obtain his release from custody pending disposition of criminal charges (instead of having a surety post a bail bond, or having government bonds deposited, or having equity in real property given as security), the depositor of the cash enters into a contract with the State. The state statutes and regulations describe the terms of the contract, including under what circumstances the deposited money will be forfeited to the State (for failure to appear, for example) and when it will be returned to the depositor. This contract does not require payment of interest to the depositor.

B. The federal takings precedent cited by petitioners has nothing to do with such a voluntary agreement. The cases on which petitioners attempt to rely involved situations where either the State required that certain cash or assets be deposited or invested in a particular manner and the interest used to further a purpose selected by the State, or the State essentially compelled a citizen to deposit money with the State by making such a monetary deposit the sole means of obtaining a benefit that only the government could provide.

Moreover, petitioners assert that all 50 States follow the same practice of not paying interest on cash posted for bail. But petitioners point to no

contrary case law holding such a practice violates the Takings Clause.

For all these reasons, the petition should be denied.

I. THRESHOLD JURISDICTIONAL OBSTACLES WOULD PREVENT A RULING ON THE MERITS IN THIS CASE, MAKING IT AN INAPPROPRIATE VEHICLE TO ADDRESS PETITIONERS' TAKINGS CLAIM

A. Petitioners Lack Article III Standing Because They Did Not Own The Money On Which The Interest They Now Seek Was Earned

1. Petitioners attempt to invoke this Court's *certiorari* jurisdiction to review an unpublished ruling from a state court on their claim that respondents violated the Takings Clause of the Fifth Amendment (as incorporated by the Fourteenth Amendment). Because petitioners seek now to invoke the jurisdiction of a federal court, they bear the burden of demonstrating that they have Article III standing. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 623 n.2 (1989) (reaffirming holding of *Doremus v. Board of Education*, 342 U.S. 429 (1952), that plaintiffs who file suit in state court, but would have lacked standing to bring suit in federal district court, lack standing to obtain a writ of *certiorari* from this Court to review an adverse state court decision).

Federal standing law requires that a party experience injury-in-fact and generally "must assert

his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalksi v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). That requirement means that petitioners do not have standing to obtain review in federal court because they did not experience injury and are not asserting their own legal rights and interests inasmuch as they did not own the money deposited as bail. Pet. App. 4-5.[1] Even if the owner of the money had a constitutional right to any interest that may have been earned after the money was deposited to obtain release of a criminal defendant (which we maintain an owner does not), petitioners, as non-owners of the money, do not have any such right.

The fact that the cash deposit is returned to the depositor does not alter this fact. The statute that provides for such return to the depositor after exoneration, Cal. Penal Code § 1297, does not provide for any payment of interest to either the depositor or

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[1] As set forth on pages 5-6, *supra*, the undisputed evidence on the summary judgment motions before the lower courts demonstrated that petitioners Overland and Overland & Borenstein LLP did not own the money they deposited as bail, and the record is bereft of any evidence that petitioner Poloski owned the money she deposited as bail. Indeed, even petitioners' complaint does not allege that petitioners owned the money deposited, C.A.E.R. 2-4, but in any event, because the trial court resolved this matter on summary judgment, petitioners cannot rely on the pleadings and must submit admissible evidence to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

the owner of the cash deposit. The requirement that the cash deposit be returned to the person who deposited it does not by itself give that person a right in any interest earned on the cash deposit. (This is so even if the owner of the cash had such a right in any interest, which he does not for the reasons discussed in Part II, *infra*).

2. This standing doctrine of the Court that does not allow litigants to invoke the injuries or rights of others is based on the presumption that "the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Kowalksi*, 543 U.S. at 129. The Court's exception to this rule that would allow a party to invoke in litigation the rights of another, requires that the litigant show that it "has a 'close' relationship with the person who possesses the right," and that "there is a 'hindrance' to the possessor's ability to protect his own interests." *Id.* at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Petitioners do not meet that standard.

There is no suggestion, much less evidence in the record, that petitioners have a close relationship with the owners of the deposited money. Indeed, in two of the instances, the record does not identify the owner of the cash deposit. In the third instance, the owner is the criminal defendant who was released on bail and the depositor was the petitioner law firm. There is nothing in the record, however, that demonstrates the relationship between the defendant and the law firm.

Even if that defendant were a law firm client, the relationship between a law firm and a client would not meet the "closeness" requirement because the attorney-client relationship has no relation to the economic right claimed by petitioners. *Cf. Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (a party has standing to challenge statute affecting its clients' rights only where "[t]he activity sought to be protected is at the heart of the business relationship between [the party] and its clients").

There also is no suggestion or evidence in the record that there was any "hindrance" that prevented the persons who owned the cash deposits from bringing suit to attempt to argue an entitlement to interest earned, if they were so inclined.

3. The rule against allowing litigants to invoke the rights of third parties should be enforced with particular vigor in cases, such as this, when the remedy sought is payment of money. There is nothing in the record to show that petitioners have any legally binding arrangement with the people who owned the money regarding the disposition of any interest that petitioners might recover in this litigation. If petitioners prevailed, they might keep the interest for themselves and the true owners could then also seek to sue the same respondents here for the same interest. *Cf. United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 554-555, 556 (1996) (absent instruction by Congress to contrary, an association lacks prudential

standing to bring damage actions on behalf of its members because of, *inter alia*, the "risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed"). There is no reason to countenance this risk of double recovery against respondents.

B. Respondent Superior Court Is An "Arm Of The State" And Respondent County Is Its Agent And They Thus Are Not "Persons" Subject To Suit Under Section 1983 And Are Immune From Such Suit Under The Eleventh Amendment

Petitioners' claim of a taking without just compensation does not raise a substantial federal question in the circumstances of this case because respondents are not susceptible to suit under 42 U.S.C. § 1983 and also are entitled to Eleventh Amendment immunity from suit.[2]

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[2] Petitioners' complaint failed to expressly identify the cause of action on which they relied to bring their federal constitutional takings claim, but the only conclusion can be that their claim is predicated on Section 1983. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709-710 (1999) (federal takings claims may be enforced through Section 1983). There is no California state law cause of action that authorizes a suit to obtain money for a violation of federal constitutional rights. *See Griffith v. Monterey County*, No. H032108, 2008 WL 2352489, at *6 (Cal. Ct. App. June 10, 2008) ("A litigant seeking

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1. a. Respondent Superior Court is a government entity that is an "arm of the State," inasmuch as it is part of the judicial branch of the State of California and exercises state authority. The California Supreme Court has explained that "[t]he superior courts of the state of California, while located and functioning in the several counties of the state, are not local or county courts, but constitute a system of state courts, being vested with and exercising the judicial power of the state under the express terms of section 1 of article VI of the state constitution." *Sacramento & San Joaquin Drainage Dist. v. Superior Court of the County of Colusa*, 196 Cal. 414, 432 (Cal. 1925); *see also United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754 n.23 (1950) (a California Superior Court "is not a local court but a part of a system of state courts"); *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987) ("state case law and constitutional provisions make clear that the [Superior] Court is a State agency").

Respondent County would not generally constitute an arm of the State, but in the

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damages based on a violation of a [federal] constitutional right must rely on Title 42 United States Code section 1983."); *Klat v. Regents of Univ. of California San Diego*, No. D041793, 2003 WL 22963102, at *4 (Cal. Ct. App. Dec. 17, 2003) (Section 1983 "is the exclusive means for [plaintiff] to bring her claim against the [defendants] for asserted violations of her due process rights or any other constitutional rights."), *cert. denied*, 543 U.S. 918 (2004).

circumstances of this case, the respondent County is acting as an agent of the respondent Superior Court, as it argued below. *See* Resp. County C.A. Br. 16-19. That is because cash deposited with a superior court in California, such as cash deposits for bail, must be transferred to the county treasurer, where it is held pending an order from the court directing withdrawal or payment. Cal. Govt. Code § 68084(a)-(b). When a county takes possession of such deposits, "the county treasurer in handling the funds must look to the court for direction; the county treasurer is in effect the treasurer of the court, an *ex-officio* officer, and holds the money for the court, not for the county." *Metropolitan Water Dist. of Southern California v. Adams*, 32 Cal. 2d 620, 628 (1948); *see also City of Santa Clara v. County of Santa Clara*, 1 Cal. App. 3d 493, 497 (1969) (county officials are officers of the court when handling cash deposits made with the court); *Hart v. County of Alameda*, 76 Cal. App. 4th 766, 776-777 (1999) ("[a]lthough the county treasurer is a county employee who also has control over county funds, when the treasurer initially receives a jury deposit from the court to hold as a deposit, the treasurer is acting as an arm of the court").

Thus, as the agent for respondent Superior Court, respondent County is entitled to the same federal protections as respondent Superior Court itself. *See, e.g., Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999) (county officials are arms of the state where they act in compliance with state mandate); *Scott v. O'Grady*, 975 F.2d 366, 371 (7th

Cir. 1992) (same), *cert. denied*, 508 U.S. 942 (1993); *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) (same).

b. Because respondents are an arm of the State and its agent, they are not susceptible to suit under 42 U.S.C. § 1983. Section 1983 provides a cause of action against "every person" who acts under color of state law to deny another person their rights under federal law. A State and its arms are not appropriate defendants in a Section 1983 suit because they are not "persons" against whom the statute authorizes suit. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 & n.24 (1997); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Indeed, the Ninth Circuit has held that California superior courts are not "persons" subject to suit under Section 1983. *See Burgess v. Carmichael*, 37 Fed. Appx. 288, 292-293 (9th Cir. 2002), *cert. denied*, 537 U.S. 1125 (2003).

c. The fact that an arm of a State is not susceptible to suit as a defendant in an action under Section 1983 is so firmly foreclosed by past precedent that such a claim does not raise a "substantial federal question." *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) (allegations that have been previously rejected by Supreme Court case law are so insubstantial as not to confer federal jurisdiction); *see also Consolidated Tpk. Co. v. Norfolk & O.V. Ry. Co.*, 228 U.S. 596, 599-600 (1913) (defining substantial federal question for purposes of Supreme Court's appellate jurisdiction).

This Court lacks jurisdiction over a case under the *certiorari* statute, 28 U.S.C. § 1257, in the absence of a "substantial federal question." *See, e.g., Sevier Comm'n Co. v. Wallowa Nat'l Bank*, 287 U.S. 575 (1932); *Spurrier v. Mitchell Irrigation Dist.*, 283 U.S. 796 (1931); *Hallam v. Grant*, 280 U.S. 522 (1929); *McPherson Bros. Co. v. Okanogan-Douglas Inter-County Bridge Co.*, 278 U.S. 571 (1928).

2. Respondents are immune from suit under the Eleventh Amendment.

The Eleventh Amendment grants an arm of a State, and thus its agent, immunity from being sued in private litigation in both state court and federal court. *See Alden v. Maine*, 527 U.S. 706 (1999). Section 1983 does not abrogate Eleventh Amendment immunity to suit. *See Quern v. Jordan*, 440 U.S. 332, 339-345 (1979); *Edelman v. Jordan*, 415 U.S. 651, 676-677 (1974).[3]

The Ninth Circuit has recognized that Section 1983 claims cannot be brought against a California superior court because of such immunity. *See, e.g., Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) ("Plaintiff cannot state

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[3] The Eleventh Amendment is properly raised by respondents in this Court for the first time because it "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised" in the lower courts. *Edelman*, 415 U.S. at 678 (citing *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466-467 (1945)).

a claim against the Sacramento County Superior Court (or its employees), because such suits are barred by the Eleventh Amendment."). Because respondent County was acting as an agent of respondent Superior Court in this circumstance, it too cannot be held liable in such a suit. *Cf. Shands Teaching Hosp. & Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (private entity entitled to State's Eleventh Amendment immunity when it manages a program over which the State retains control and functions solely as "administrators acting at the behest of the State").[4]

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[4] Petitioners initially sued two government officials as well as respondents Superior Court and County but, as noted on page ii, *supra*, petitioners did not seek review in the *certiorari* petition of the lower court's entry of judgment in favor of these officials. This Court is thus precluded from determining their rights or liabilities. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 89 (1946) (when certain parties in proceedings below "have not been named as respondents here," this Court is "precluded from making any determination concerning their rights or liabilities"). Indeed, it appears that petitioners never independently pursued claims against these officials during the course of the proceedings.

In any event, these officials, to the extent they are sued in their official capacities, are entitled to the same Eleventh Amendment immunity from damages as the government entity they serve. *See Will*, 491 U.S. at 71. The *Ex parte Young* exception to Eleventh Amendment immunity, which allows suits against state officials under Section 1983 for prospective injunctive and declaratory relief, *id.* at 71 n.10, is not applicable in this case because money, not an injunction or declaration, is the only appropriate remedy for an alleged taking without just compensation, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986,

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II. REVIEW IS NOT WARRANTED BECAUSE THE CALIFORNIA COURT OF APPEAL WAS CORRECT THAT NO UNCONSTITUTIONAL TAKING OCCURRED AND THERE IS NO CONFLICT WITH PRECEDENT OF ANY OTHER COURT

Even apart from the profound jurisdictional problems inhering in this case that make it an improper vehicle for this Court's review, there is no reason to grant *certiorari*. The California Court of Appeal correctly ruled that this case is properly viewed as a contract between the depositor of the bail money and the government and that contract does not require payment of interest. Furthermore, petitioners did not take advantage of potentially available state court remedies, which are a necessary precursor to a federal Takings Claim. Finally, petitioners point to no other case involving the Takings Clause and bail and there is no conflict between the decision below and the decisions of this Court or any other court.

1016 (1984), and because petitioners have not established the likelihood that they themselves would experience the same injury in the future, a showing necessary for them to have standing to seek injunctive or declaratory relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 111 (1983).

A. The California Court Of Appeal Correctly Ruled That No Interest Payment Is Required Because Petitioners Voluntarily Chose A Cash Deposit In Lieu Of Other Options As The Means To Obtain Release Of A Criminal Defendant On Bail

1. California law provides several means by which to obtain the release of a criminal defendant pending disposition of criminal charges after the court sets bail. One of four methods may be used: posting of a bail bond; deposit of cash equal to the amount of bail (as petitioners did); deposit of government bonds of that amount; or provision of equity in real property that is valued at twice that of the cash deposit required. *See* pages 1-4, *supra*.

Each of the four means of obtaining release on bail has a different set of risks and rewards for the person posting bail or making the deposit of cash, bonds, or real property. For example, if a criminal defendant opts to post a bail bond, a professional surety, or "bail bondsman," will typically charge him or her a nonrefundable fee of 10 percent of the amount of the bond, and will usually require the defendant to post security in addition to the fee. 1 *California Criminal Defense Practice* § 12.06[2] (Matthew Bender & Co. 2008). Therefore, this option would be more costly to a criminal defendant than a cash deposit of his own funds. Moreover, the defendant has no right to earn any interest on

whatever security is given to the bail bondsman because that is a matter governed by private contract.

A choice to, instead, give as security an equity in real property imposes a much greater risk on the person giving the equity as security because he will experience a unique injury if the defendant fails to appear and the court orders the real property (usually a home) to be sold. Furthermore, that person's ability to sell or borrow against the real property would likely be impaired by the deed of trust until bail is exonerated. *See, e.g., Trustors Sec. Serv. v. Title Recon Tracking Serv.*, 49 Cal. App. 4th 592, 596 (1996) (explaining that liens on real property create problems for clearing title to the property, selling the property, and obtaining loans secured by the property); *Radian Guar., Inc. v. Garamendi*, 127 Cal. App. 4th 1280, 1289 (2005) ("the value of the property is diminished or impaired by outstanding lien encumbrances").

The fact that so many options are provided by state law to those deciding what to do in light of an order setting bond distinguishes this case from many of those cited by petitioners. In those cases, the State essentially compelled a citizen to deposit money with the State by making such a monetary deposit the sole means of obtaining a benefit that only the government could provide. *See* Pet. 14, 19-20, 22, 23 (discussing cases) and pages 30-31, *infra*.

Petitioners' choice in this case to make a cash deposit to obtain release of the various criminal defendants on bail benefited them in certain ways. They gained the benefit of not working through a bail bondsman, for example, and thus did not pay any up-front fee and did not need to provide security apart from the cash itself. They also gained the benefit of not having to put at risk equity in real property of twice the value of the cash deposit.

The court of appeal was correct to view this choice to post bail pursuant to the terms set forth in the statute for cash deposits as a contract between the depositor and the State. The state statutes and regulations describe the terms of the agreement, including under what circumstances, and when, the money deposited will be forfeited to the State (for failure of the criminal defendant to appear, for example) or returned to the depositor and they form an implied contract in law. And the court of appeal was correct that this contract does not require the payment of interest to the depositor.

2. This does not mean, however, that state law necessarily offers petitioners no potential avenue of relief for allegations of undue delay in returning cash deposits. As the court of appeal correctly noted, such delay "conceivably could give rise to a contract claim" but it "does not constitute a taking." Pet. App. 14. State law requires that the cash deposit be returned to the depositor within 10 days after "the person claims it by submitting the receipt" he received when he deposited the money. Cal. Penal Code § 1297.

Petitioners, however, did not submit their bail receipts, and thus did not trigger the 10-day return requirement embodied in that statute.

In any event, the Takings Clause would not require compensation for conduct that is not authorized by state law because that constitutional provision is concerned with the official actions of the government that amount to a condemnation of property, not the conduct of individual government officials. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *Hooe v. United States*, 218 U.S. 322, 335-336 (1910). Compensating for any such conduct is solely the role of tort or contract law. *See United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 333-334 (1920); *Ribas y Hijo v. United States*, 194 U.S. 315, 323 (1904); *cf. Brown v. Legal Foundation of Washington*, 538 U.S. 216, 239 (2003) (if lawyer, in violation of state law, deposits money that could earn interest in an account where interest went to a third party at the direction of State, remedy for failure to earn interest is a state contract or tort action against lawyer, not a takings claim against the State).[5]

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[5] This substantive rule that unauthorized government conduct cannot constitute a taking parallels the ripeness requirement of the Takings Clause that a person who seeks just compensation for a taking under federal law must seek compensation in state court through all available state procedures before the federal takings claim is ripe. *See Williamson County Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This is because the right

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B. The Ruling Of The Court Of Appeal Does Not Conflict With Precedent Of This Court Or Of Lower Courts

Petitioners argue that the decision below directly conflicts with a variety of court decisions, but those cases had nothing to do with bail and are plainly inapt.

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protected by the Takings Clause is the right to just compensation from the State, not the right to be free from a taking. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999); *Eastern Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment).

In their reply brief and supplemental submission to the state appellate court, petitioners identified two state law claims that, they asserted, would provide them relief by giving them all (or virtually all) the post-exoneration interest earned on the bail money that they deposited: a state equitable claim of unjust enrichment (which they contended would entitle them to all the interest earned) and a state breach of implied contract (which they contended would entitle them to statutory interest for any unauthorized delay in returning the money). Pet. C.A. Reply Br. 21-22; Pet. C.A. Supp. Ltr. Br. 3, 5-6. Petitioners now describe these remedies as "unavailable," Pet. 16, 17, but the reason that these state remedies are not available to them in this action is because they abandoned the unjust enrichment claim by not raising it until their reply brief in the court of appeal (contrary to state law procedures) and waived the state contract claim by expressly disavowing a contract claim in that court. Pet. App. 16-17, 24-25. The court of appeal so held and also noted that these claims might have been viable if properly raised. Pet. App. 17. Petitioners' abandonment and waiver of colorable state claims did not meet their obligation to seek just compensation through existing state procedures, and thus their takings claim is also unripe. This ripeness issue can be raised and considered in this Court even though not pressed or passed on below. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993).

1. Petitioners rely primarily (Pet. i, 9-10, 12, 13, 14-15, 22, 23) on *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), but those cases involved unilateral government regulation of private conduct. The decisions addressed a government regulatory scheme that required lawyers to deposit certain client funds into an interest-bearing account, and then diverted the interest earned in that account to further a purpose selected by the State, *i.e.*, to foundations that financed legal services for low-income individuals. The lawyers and clients had no choice in the matter. The State thus was regulating how private parties had to act with certain funds and unilaterally appropriated for its own purposes interest accrued on those funds.

Four of the five lower court takings cases cited by petitioners (Pet. 14, 22, 23) likewise involved unilateral government action against private property. *See Canel v. Topinka*, 793 N.E.2d 845, 853 (Ill. App. Ct. 2003) (Takings Clause required payment of stock dividends when state law transferred to the State itself custody in stocks believed to be abandoned but later claimed by owner); *Arthur v. District of Columbia*, 857 A.2d 473, 477 & n.7, 491 (D.C. 2004) (Takings Clause required payment of interest when court ordered litigant to make monthly payments to court while litigation over property was being resolved and, subsequently, court-ordered payments and proceeds of sale of property were transferred from court to the Treasurer of the District

of Columbia on the grounds they were abandoned when parties failed to prosecute litigation); *McIntyre v. Bayer*, 339 F.3d 1097, 1098 (9th Cir. 2003) (Takings Clause required payment of interest when State required prison inmate to keep his money, including money received from outside prison, in state account); *Anderson v. Spear*, 356 F.3d 651, 669-670 (6th Cir.) (Takings Clause violated when state law transferred to State itself the funds remaining in a candidate's campaign account after an election), *cert. denied*, 543 U.S. 956 (2004).

By contrast, in this instance, petitioners voluntarily deposited the cash with respondents as a means to obtain the release of a criminal defendant. This voluntary conduct is not, as petitioners suggest (Pet. 21), relevant only to the question whether petitioners waived a constitutional right. It is relevant because a private party voluntarily giving money to the government is in a different position than a private party who has no choice but to give the government what it demands. *See Berkman v. United States*, 250 U.S. 114, 118 (1919) ("[o]bviously" criminal defendants' "property was not taken for public use" when "[w]ith full knowledge they voluntarily asked to deposit money with the clerk, and later requested that he be required to pay it out.").

2. The other Takings Clause cases on which petitioners rely are inapposite because in those cases a private person was required to deposit funds with

the government as the sole means to obtain a government benefit.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), a person deposited certain funds with a court because such a deposit was "required by state statute" in order for a party "to avail itself of statutory protection from claims of creditors and others." *Id.* at 164. In such a situation, the Takings Clause required payment of the interest earned on the mandated deposit. Similarly, the only other lower court case on which petitioners rely (Pet. 14, 19-20, 22, 23) held that the Takings Clause required the payment of interest earned on deposits by prison inmates who had no choice but to deposit money in a government account if they wanted to purchase items from the prison canteen, which was the exclusive permissible source for obtaining items for use in the prison. *See Schneider v. California Dep't of Corrections*, 345 F.3d 716, 718 (9th Cir. 2003).

These cases are not relevant here because, as noted above, petitioners had a range of options for obtaining the release of a criminal defendant, including obtaining a bail bond through a bondsman (which would have charged a fee and perhaps security), or giving as security an equity interest in real property (which would have posed a risk of the depositor's home or other real property being sold).

Petitioners point to no case other than the instant case that addresses a takings challenge to recover interest earned on a cash deposit for bail.

This is particularly significant because petitioners state that they believe that no State remits to cash depositors the interest earned post-exoneration on bail money. Pet. 4-5. Petitioners' failure to identify any other court that has addressed this issue, much less one that has reached a different conclusion from the state courts below, strongly weighs against this Court's review of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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